83-751

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
PETITIONERS

v.

JERRY T. O'BRIEN, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General
LOUIS F. CLAIBORNE
Deputy Solicitor General
SAMUEL A. ALITO, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
General Counsel
PAUL GONSON
Solicitor
LINDA D. FIENBERG
Associate General Counsel
HARRY J. WEISS
Special Trial Counsel
ELIZABETH A. SPURLOCK
Attorney
Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether the Securities and Exchange Commission must notify "targets" of its non-public investigations when subpoenas are issued to third parties.

PARTIES TO THE PROCEEDING

Petitioners (who were defendants and cross-defendants in the district court and appellees in the court of appeals) are the Securities and Exchange Commission and Jack H. Bookey, Lane B. Emory, and George N. Prince, employees of the Commission's Seattle Regional Office.

Respondents are Jerry T. O'Brien, Inc. d/b/a/ Pennaluna & Co.; Jerry T. O'Brien; Benjamin A. Harrison; and Pennaluna & Co., Inc. (all of whom were plaintiffs in the district court and appellants in the court of appeals) and Harry F. Magnuson and H.F. Magnuson & Co. (who were defendants and cross-plaintiffs in the district court and appellants in the court of appeals).

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The Solicitor General, on behalf of the Securities and Exchange Commission and three of its employees, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 704 F.2d 1065. The opinions of the district court (App., *infra*, 9a-16a, 17a-24a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1983. A timely petition for rehearing was denied on September 30, 1983 (App., *infra*, 25a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a *et seq.*, the Securities Exchange Act of 1934 (Securities Exchange Act), 15 U.S.C. 78a *et seq.*, the Public Utility Holding Company Act of 1935, 15 U.S.C. 79 *et seq.*, the Trust Indenture Act of 1939,

15 U.S.C. 77aaa *et seq.*, the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*, are set forth in App., *infra*, 31a-438a.

STATEMENT

This petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit compelling the Securities and Exchange Commission to furnish "targets" of its non-public, fact-gathering inquiries with notice of subpoenas issued to other witnesses.

1. Under its statutes, the Commission has express authority to conduct such investigations as it deems necessary and to issue subpoenas for testimony and documents.[1] The rules governing such inquiries provide that "[u]nless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public."[2] Commission investigations, to which there are no parties, are preliminary, non-adjudicatory inquiries[3] that are conducted to determine whether law enforcement proceedings should be commenced. After an investigation is completed, the Commission may institute an administrative adjudicatory proceeding,[4] file an injunctive action in a federal district court,

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[1] See Section 19(b) of the Securities Act, 15 U.S.C. 77s(b), and Section 21(a) and (b) of the Securities Exchange Act, 15 U.S.C. 78u(a) and (b). The Commission delegates its investigatory subpoena power to its staff by entering formal orders of investigation. See generally 17 C.F.R. 202.5. Commission subpoenas are not self-executing; the subpoena recipient may refuse to comply and await a possible subpoena enforcement proceeding brought by the Commission in an appropriate federal district court. Section 22(b) of the Securities Act, 15 U.S.C. 77v(b); Section 21(c) of the Securities Exchange Act, 15 U.S.C. 78u(c).

[2] 17 C.F.R. 203.5. See 17 C.F.R. 240.0-4. Virtually all Commission investigations are non-public. See 3 L. Loss, *Securities Regulation* at 1955 (2d ed. 1961). The various Commission rules concerning investigations were promulgated under the Commission's statutory authority to make "such rules and regulations as may be necessary to carry out" its statutory mandates. Section 19(a) of the Securities Act, 15 U.S.C. 77s(a). See Section 23(a)(1) of the Securities Exchange Act, 15 U.S.C. 78w(a)(1).

[3] See *Hannah* v. *Larche*, 363 U.S. 420, 446-447 (1960).

[4] The Commission's rules governing its adjudicatory proceedings provide for notice, hearing, and cross-examination. 17 C.F.R. 201.6,

refer a matter to the Department of Justice for criminal prosecution, or take no action at all.[5]

2. Respondents brought this suit to halt an ongoing nonpublic investigation. On September 3, 1980, the Commission issued a formal order of investigation *In re H.F. Magnuson & Co.* The order described certain transactions, listed provisions of the securities laws that these transactions may have violated,[6] and empowered certain employees of the Commission's Seattle Regional Office to subpoena witnesses and evidence.

In September 1981, Jerry T. O'Brien, Inc., a registered broker-dealer,[7] and certain affiliated individuals, sued the Commission and certain employees of its Seattle Regional Office to prevent the scheduled testimony of Harry F. Magnuson and others and to enjoin the investigation on the ground, among others, that it had been initiated improperly.[8] Magnuson, a customer of O'Brien, filed a cross-claim

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201.9. These rules do not apply to preliminary investigations. 17 C.F.R. 201.1.

[5] See, *e.g.*, Section 20(b) of the Securities Act, 15 U.S.C. 77t(b); Sections 15(b) and 21(d) of the Securities Exchange Act, 15 U.S.C. 78*o*(b) and 78u(d).

[6] The Commission directed the staff to determine whether the events described in the order constituted the filing of false and misleading reports with the Commission, the failure to file required statements with the Commission, or the selling of stock in violation of antifraud provisions of the securities laws. The formal order stated that the following provisions of the federal securities laws may have been violated: Sections 5(a), (c) and 17(a) of the Securities Act, 15 U.S.C. 77e(a), (c) and 77q(a); Sections 10(b), 13(a), (d), (g), 14(a) and 16(a) of the Securities Exchange Act, 15 U.S.C. 78j(b), 78m(a), (d), (g), 78n(a) and 78p(a); and Commission Rules 10b-5, 13a-1, 13d-1, 13d-2, 14a-3, 14a-9 and 16a-1, 17 C.F.R. 240.10b-5, 240.13a-1, 240.13d-1, 240.13d-2, 240.14a-3, 240.14a-9 and 240.16a-1.

[7] See Section 15(b)(1) of the Securities Exchange Act, 15 U.S.C. 78*o*(b)(1).

[8] Respondents alleged that the formal order was improper because it did not include a finding that each person being investigated had likely committed a violation. They claimed that the Commission did not have a valid purpose for investigating them and should have given them notice of, and the opportunity to comment on, the commencement of the investigation. In addition, they alleged that the Commission was

and third-party complaint against the Commission raising similar challenges.

3. In January 1982, the district court dismissed respondents' claims for injunctive relief,[9] since respondents' challenges to the legality of the investigation could be litigated if and when the Commission brought an action to enforce its subpoenas (App., *infra*, 17a-24a).[10] Respondents then moved for an injunction pending appeal and, for the first time, sought notice of subpoenas issued to third parties. The district court issued a second order (App., *infra*, 9a-16a) declining to "fashion such a novel remedy" (*id.* at 12a).

4. On April 25, 1983, the court of appeals affirmed the dismissal of all claims for injunctive relief except respondents' request for notice. The court acknowledged (App., *infra*, 6a) that persons and firms under investigation generally "have no right to protect or withhold documents held by a third party." The court stated, however, that "targets"[11] of investigations "have a right to be investigated consistently with the standards" of *United States* v.

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reinvestigating matters litigated and settled by the parties in 1975. One respondent alleged that the Commission staff's inspection of records on file at the Spokane Stock Exchange violated his constitutional and common law rights to privacy. Respondents also made claims under the Privacy Act, 5 U.S.C. 552a.

[9] The court also determined that the Commission's investigation was lawful (App., *infra*, 19a). Respondents' claims for damages under the Privacy Act are still pending.

[10] At that time, no subpoena enforcement proceedings relating to this investigation had been initiated. Subsequently, the Commission filed subpoena enforcement actions against some of the respondents and others. *SEC* v. *Magnuson*, No. 82-1178-Z (D. Mass. Aug. 11, 1982) (enforcing three Commission subpoenas); and *SEC* v. *Magnuson*, No. C-82-282-RJM (E.D. Wash.) (under submission since July 1982). In addition, in *Magnuson* v. *SEC*, No. 82-2042 (D. Idaho July 27, 1982), the district court enforced, under the Right to Financial Privacy Act of 1978 (RFPA), 12 U.S.C. 3401 *et seq.*, the Commission's subpoena for certain bank records. In each of these actions, the lawfulness of this investigation was challenged, and, in the two decided cases, the challenges were rejected.

[11] The court of appeals made no attempt to define the term "target," which is not used by the Commission in its investigations. See page 16 & note 41, *infra*.

Powell, 379 U.S. 48 (1964) (App., *infra*, 6a), and are thus entitled to notice of third-party subpoenas so that they can assert this right "by seeking permissive intervention in enforcement proceedings brought by the agency against the third party or by other appropriate district court proceedings" (*id.* at 7a).[12]

5. The Commission filed a petition for rehearing with a suggestion for rehearing en banc, and the United States filed a brief amicus curiae in support of the petition on behalf of more than 20 other agencies whose practices were threatened by the panel decision (U.S. Am. Br. 2 n.1). The court of appeals denied (App., *infra*, 25a) rehearing en banc. Writing for the five dissenters, Judge Kennedy stated (*id.* at 26a) that the court had "decline[d] to review a panel decision that is novel, of vast importance, and, in my view, most erroneous. Our refusal to review panel decisions of this type imposes an unnecessary burden on the Supreme Court." He also noted (*id.* at 26a-27a):

> There is no principled basis for confining the panel holding to the context of an SEC investigation. It threatens to compromise government investigations by most agencies. Not only will wrongdoers be provided a new instrument of obstruction or delay, but also employees and others subject to reprisals will be chilled from cooperating with investigators. Under the panel decision, government agencies will find it increasingly difficult to conduct confidential, nonpublic investigations in which actual targets are not discovered until a number of subpoenas have been served. Agencies may instead be forced to articulate premature conclusions about potential targets.

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[12] The court rejected the Commission's argument that respondents could not seek notice because they lacked standing to challenge third-party subpoenas. See *United States* v. *Miller*, 425 U.S. 435, 444 (1976). The court held (App., *infra*, 7a) that *Miller* and other standing cases were irrelevant because they concerned the asserted right of targets "to maintain the confidentiality of information held by third parties" rather than "the right to be investigated consistently with the *Powell* standards."

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is not supported by any constitutional provision, statute, rule, or judicial decision; is inconsistent with the reasoning of decisions of this Court and numerous other courts of appeals; is contrary to a half-century of unbroken administrative practice; and threatens seriously to impede important investigations conducted by the Securities and Exchange Commission and more than 35 other agencies that have never previously been required to notify persons or firms under investigation when subpoenas are issued to third parties (see Addendum *infra*, 18-25).

1. The court of appeals' decision is based upon nothing but the court's own notion of sound public policy. The court did not purport to rest its novel decision on any provision of the Constitution, and it is clear that none applies. The Fourth Amendment does not impose such a notice requirement. In *Donaldson* v. *United States*, 400 U.S. 517, 522, 530 (1971), the Court made clear that an individual has no Fourth Amendment interest in the records of third parties and that one's status as a target of an investigation does not create a right to challenge third-party subpoenas. And in *United States* v. *Miller*, 425 U.S. 435, 443 (1976), the Court reaffirmed that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." In addition, the Court noted (*id.* at 443 n.5) that, because the target lacked a Fourth Amendment interest in information subpoenaed from third parties, the agency's failure to afford notice of the subpoena was "without legal consequences." See *United States* v. *Payner*, 447 U.S. 727, 732 (1980).

The court below did not rely on the Fifth Amendment's Due Process Clause.[13] Had it done so, its decision would

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[13] By contrast, in *Wedbush, Noble, Cooke, Inc.* v. *SEC*, No. CV-83-3961 CBM (KX) (C.D. Cal. July 11, 1983) (order granting preliminary injunction), a district court in the Ninth Circuit relied on the decision below in holding that there is a "due process right to notice of third party subpoenas." The court preliminarily enjoined the Commis-

squarely conflict with *Hannah* v. *Larche*, 363 U.S. 420 (1960).[14] In *Hannah*, the Court held that, prior to the initiation of formal charges, due process does not afford persons under investigation by a governmental agency such as the SEC[15] the right to be notified of adverse evidence or the identity of accusers. The Court expressly analogized (*id.* at 449 & n.30) administrative investigations to grand jury proceedings, the targets of which have never been entitled to notice of the identity of witnesses.[16] Fifth Amendment procedural protections, the Court held (363 U.S. at 449-451), are not required in agency or grand jury investigations because such inquiries do not adjudicate any legal rights but, at most, may lead to subsequent proceedings at which all the claimed procedural protections would fully apply. Moreover, the Court noted (*id.* at 443-444) that requiring such "trial-like" procedures would "make a shambles of the investigation and stifle the agency in its gathering of facts."[17]

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sion from issuing third-party subpoenas without notice to the targets. See App., *infra*, 28a-30a; 714 F.2d 927 (9th Cir. 1983).

[14] The Fifth Amendment privilege against compelled self-incrimination is also inapplicable because a subpoena issued to a third party does not compel the target to give testimony. *E.g.*, *Fisher* v. *United States*, 425 U.S. 391, 397 (1976); *Couch* v. *United States*, 409 U.S. 322 (1973). Cf. *United States* v. *Washington*, 431 U.S. 181, 189 (1977) (one's status as a target of a grand jury investigation "neither enlarges nor diminishes the [Fifth Amendment] protection against compelled self-incrimination," and thus prosecutors need not provide special notice to a target).

[15] The Court specifically cited the Securities and Exchange Commission as an example of an agency that properly draws a distinction between the procedural rights afforded in adjudicatory hearings and investigations (363 U.S. at 446-448).

[16] The Court has analogized agency investigations to grand jury inquiries in other contexts as well. See, *e.g.*, *United States* v. *Powell*, 379 U.S. at 57; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642 (1950).

[17] Additionally, the Sixth Amendment's Confrontation Clause does not apply because criminal proceedings have not been initiated. *Hannah* v. *Larche*, 363 U.S. at 440 n.16, citing *United States* v. *Zucker*, 161 U.S. 475, 481 (1896). And respondents made no claim that any third-party subpoenas interfered with their First Amendment rights. See *Laird* v. *Tatum*, 408 U.S. 1, 10-11, 13 (1972) (targets have no

2. The court of appeals likewise cited no statute that compels the Commission to provide notice of third-party subpoenas, and none exists. The statutes that authorize the SEC to conduct investigations, subpoena witnesses and records, and seek judicial enforcement of its subpoenas (see, *e.g.*, 15 U.S.C. 78u(a)-(c)) contain no hint that such notice is required.[18] Indeed, Congress has specifically considered this issue as it applies to the Commission and, except in very limited circumstances not applicable here or in the case of most investigative subpoenas, has not required that investigatees be notified of third-party subpoenas.[19] The absence of any other notice requirement in statutes governing the Commission's subpoena powers creates the

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First Amendment interest in, and hence no standing to challenge, the existence of an allegedly overbroad investigation).

[18] As noted in *Hannah* v. *Larche*, 363 U.S. at 427 n.9, such provisions reflect the way Congress customarily "confers the subpoena power on an investigative agency." No suggestion was made in *Hannah* that this sort of provision provides a statutory basis for requiring notice of third-party subpoenas (see *id.* at 430-433).

[19] Under the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401(1) and (5), the Commission and many other agencies must notify certain "customers" of specified "financial institutions" regarding subpoenas for their account records. 15 U.S.C. 78u(h). In enacting the RFPA, Congress carefully limited the class of persons entitled to notice (12 U.S.C. 3401(4) and (5)) and limited the requirement to subpoenas for the records of certain financial institutions. Congress also established procedures expressly designed to prevent notice from serving as a "sword for delay and obstruction" of law enforcement investigations. H.R. Rep. 96-1321, 96th Cong., 2d Sess., Pt. 1, at 4 (1980). See 12 U.S.C. 3410(a) and (b).

When Congress made the RFPA applicable to the Commission, it devoted special attention to the impact of even this limited notice requirement on the Commission's investigatory subpoenas. Because of problems that notice would create in the investigation of securities law violations, Congress specifically exempted the Commission from the RFPA for a two-year period. 12 U.S.C. 3422. Prior to the expiration of that exemption, Congress enacted a special statutory provision authorizing the Commission to avoid the notice requirements of the RFPA by making an ex parte application to a federal district court. Section 21(h)(2), of the Securities Exchange Act, 15 U.S.C. 78u(h)(2).

"presumption" that Congress did not intend to impose such a burden. *Hannah* v. *Larche*, 363 U.S. at 433.[20]

In exercising its express statutory authority to establish procedures governing its investigations,[21] the Commission has not provided for notice of third-party subpoenas.[22] These procedures, which are similar to those of most other investigating agencies,[23] reflect the Commission's judgment concerning how best to balance its investigative needs against the legitimate interests of individuals under investigation. There is no evidence—and the court of appeals did not find—that the Commission's procedures have been unfair or oppressive.[24] Nor is there any proof that the court's novel notice requirement would significantly promote any legitimate interests. Without any evidence or expertise in

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[20] When Congress has considered notice desirable, it has enacted notice statutes. See 26 U.S.C. (& Supp. V) 7609 (notice procedures for third-party IRS subpoenas); cf. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. (& Supp. V) 1232g.

[21] Section 19(a) of the Securities Act, 15 U.S.C. 77s(a); Section 23(a)(1) of the Securities Exchange Act, 15 U.S.C. 78w(a)(1).

[22] See pages 2-3 & note 4, *supra*.

[23] *Hannah* v. *Larche*, 363 U.S. at 444. See page 12 & note 31, *infra*.

[24] As discussed above, during its deliberations concerning the Right to Financial Privacy Act of 1978, Congress specifically considered the implications of affording notice of Commission subpoenas to persons under investigation. See page 8 note 19, *supra*. Congress found that the Commission "had an excellent record with respect to the use of its subpoena authority." H.R. Rep. 96-1321, *supra*, at 4.

Moreover, the court below ignored the presumption of regularity that attaches to administrative action. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). The mere possibility of abuse of investigatory authority does not establish a constitutional defect. *In re Groban*, 352 U.S. 330, 334 (1957). Cf. *United States* v. *Calandra*, 414 U.S. 338, 351-352 (1974) (footnote omitted) (declining "to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury").

the field, the court simply imposed its own conception of sound administrative practice.[25]

3. The court of appeals believed (App., *infra*, 7a) that notice of subpoenas issued to witnesses was required in order to "afford targets an opportunity to question whether agency actions comply with" *United States* v. *Powell*, *supra*. *Powell*, however, does not in any way suggest that such notice is necessary and does not confer an abstract "right to be investigated" in a particular manner (App., *infra*, 7a).[26] Rather, *Powell* merely concerned the showing that the Internal Revenue Service must make in order to obtain judicial enforcement of a summons. The Court held (379 U.S. at 57-58) that the IRS must show "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within [its] possession, and that the administrative steps required by the [Internal Revenue] Code have been followed."[27]

Unlike *Powell*, this case is not a subpoena enforcement action, and it consequently raises no questions regarding the showing that the Commission must make before judicial process issues.[28] Instead, this case concerns the ability of

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[25] As this Court has held, courts may not impose upon administrative agencies procedural burdens such as the Ninth Circuit's notice requirement unless a constitutional or statutory right is implicated. *FCC* v. *Schreiber*, 381 U.S. 279, 289 (1965). See *Steadman* v. *SEC*, 450 U.S. 91, 104 (1981); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978).

[26] Indeed, five members of the en banc panel of the court below stated, "[t]he rule set forth by the panel opinion goes beyond any reasonable interpretation of [*Powell*]." App., *infra*, 26a.

[27] The Commission's statutes afford it broader subpoena authority than that provided by the Internal Revenue Code. See *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1377 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980). Moreover, unlike the IRS agents in *Powell*, Commission attorneys may not issue subpoenas until the Commission's five presidentially-appointed members first determine that subpoena power should be authorized to investigate certain transactions (17 C.F.R. 202.5).

[28] For the same reason, the court of appeals' notice requirement cannot possibly be justified as an exercise of supervisory power over the district courts. The courts of appeals possess no such authority over in-

a putative target to obtain an injunction against administrative subpoenas issued in conformity with all statutory requirements.

Moreover, notice of the sort required by the court of appeals is generally not needed to effectuate *Powell* because persons under investigation may raise any alleged impropriety when the agency institutes a subpoena enforcement or other action against them. As this Court held in *Donaldson*, to the extent that a target has any "protectable interest, as, for example, by way of privilege, or to the extent [that] he may claim abuse of process, [he] may always assert that interest or that claim in due course at its proper place in any subsequent trial" (400 U.S. at 531, citing *United States* v. *Blue*, 384 U.S. 251 (1966)). Absent such agency action, the target has suffered no legal harm. See *Hannah* v. *Larche*, 363 U.S. at 442-443.

4. The decision of the court below conflicts with decisions of every other court of appeals that has considered whether notice of third-party agency subpoenas is required. See *United States* v. *Schutterle*, 586 F.2d 1201, 1204 (8th Cir. 1978) (taxpayer is not entitled to notice and hearing before enforcement of an IRS summons directed to third party); *Scarafiotti* v. *Shea*, 456 F.2d 1052, 1053 (10th Cir. 1972) (*Donaldson* does not require notice to the taxpayer of a third-party subpoena); *In re Cole*, 342 F.2d 5, 8 (2d Cir.), cert. denied, 381 U.S. 950 (1965) (IRS examinations of third parties need not be preceded by notice to the taxpayer under investigation) (cited with approval by this Court in *Donaldson*, 400 U.S. at 530).[29] Similarly, the District

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dependent administrative agencies or the Executive Branch. Moreover, even with respect to judicial proceedings, the supervisory power does not "confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing" (*United States* v. *Payner*, 447 U.S. at 737).

[29] Prior decisions of the Ninth Circuit also conflict with the decision below. See App., *infra*, 26a; *Kelley* v. *United States*, 536 F.2d 897, 899 (1976), cert. denied, 429 U.S. 1047 (1977) (subject of investigation has no Fourth Amendment interest in third party's records and thus no right to notice of investigatory summons); *Howfield* v. *United States*, 409 F.2d 694 (1969) (targets of IRS investigation have no right to pre-

Court for the Southern District of New York, relying upon *Cole* and this Court's decisions in *Miller*, *Hannah*, *Donaldson* and *Powell*, refused to follow the decision below and held that the Commission is under no obligation to provide persons under investigation with notice of subpoenas issued to witnesses. *PepsiCo, Inc.* v. *SEC*, 563 F. Supp. 828, 831-832 (S.D.N.Y. 1983).

5. The decision of the court below has seriously disrupted the Commission's law enforcement investigations.[30] Indeed, as a result of that decision, the Commission has found it necessary to hold in abeyance many of its current investigations in the Ninth Circuit. Furthermore, the harmful effects of the decision below are not confined to the Commission. More than 100 federal law enforcement and other programs depend upon subpoenas that are issued without notice to targets and pursuant to statutes analogous to the SEC's. See Addendum, *infra*, 18-25, *Hannah* v. *Larche*, 363 U.S. at 427. Unless reversed, the decision below is almost certain to impair the operation of these programs, as well as the SEC's efforts to discharge its statutory mandate.[31]

Notice concerning the identity of witnesses will delineate the focus and progress of an investigation, thereby substan-

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vent government's acquisition of information from third-party witnesses).

[30] The Commission conducts as many as 1,200 formal investigations a year (see *SEC 48th Annual Report 1982*, at 118) and issues thousands of subpoenas in aid of those investigations. For example, during the first quarter of 1983, the Commission issued over 1,400 subpoenas for testimony and documents in the course of 116 non-public, fact-finding investigations in which 305 persons were named in the formal orders of investigation. Even if the Commission were required to give notice only to those persons named in the formal orders, the Commission would have issued over 3,750 notices in the first quarter of 1983 alone, or more than 15,000 on an annual basis. This is but a fraction of the number of notices that would be required by the decision below since formal orders are not intended to identify all persons whose activities may become subject to inquiry. Therefore, under the decision, the Commission may be required to give notice to many persons not named in formal orders.

[31] "There is no principled basis for confining the panel holding to the context of an SEC investigation. It threatens to compromise government investigations by most agencies." Dissent to denial of petition for rehearing en banc. App., *infra*, 26a.

tially increasing opportunities for the destruction of documents, intimidation of witnesses, tailoring of testimony, fabrication of defenses, and the transfer or dissipation of assets. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 239 (1978); *United States* v. *Eisenberg*, 711 F.2d 959, 961 (11th Cir. 1983). In some cases, targets may threaten witnesses with physical or economic retaliation in an effort to mold their testimony or to presuade them not to testify. *Ibid.*; cf. *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 6. Third-party witnesses, who are often employees or business associates of those under investigation, are particularly vulnerable to such coercion. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. at 239; see App., *infra*, 26a. Furthermore, confidential informants, whose cooperation with the government may not be known to the target, will be reluctant to come forward and testify, fearing that disclosure of their participation will expose them to retribution.[32] The threat of such obstruction underlies the longstanding provision for secrecy of grand jury proceedings,[33] to which this Court has analogized agency investigations such as those conducted by the Commission.[34]

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[32] Notice also would needlessly expose innocent witnesses and subjects to prejudicial publicity, since their identities may no longer be confidential. A witness's participation in an investigation could lead to unfair speculation that he is accused of wrongdoing. Such publicity is particularly harmful when the Commission determines not to bring an enforcement case or not to name certain subjects in the instituted action. Cf. *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 5 (footnote omitted) ("'by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule'"), quoting *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 219 (1979); *Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 5 n.8 (grand jury secrecy rule also protects third parties). Congress has recognized these privacy interests in the Freedom of Information Act. See 5 U.S.C. 552(b)(7)(C); *FBI* v. *Abramson*, 456 U.S. 615 (1982).

[33] See Rule 6(e), Fed. R. Crim. P.; *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 6.

[34] See generally cases cited, page 7 & note 16, *supra*. Congress also protected agency inquiries from such potential abuses when, in en-

Notice also will enable targets to delay investigations and subsequent law enforcement proceedings. Targets will encourage witnesses not to comply with legitimate subpoenas, thereby forcing the agency to seek judicial enforcement in many instances where it would not otherwise be necessary.[35] And, under the rationale of the court of appeals, targets may intervene in numerous subpoena enforcement proceedings largely for the purpose of delay.[36] Even if a witness desires to comply voluntarily with a subpoena, targets armed with advance notice can be expected to file frivolous independent actions to delay compliance.[37] As a re-

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acting the Freedom of Information Act, it created an exemption for information in active law enforcement investigative files. See 5 U.S.C. 552(b)(7)(A); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). Courts also have recognized an "investigatory files privilege," which protects information in active law investigative files if its disclosure would compromise the investigation. See, *e.g.*, *United States* v. *Winner*, 641 F.2d 825, 831 (10th Cir. 1981); *Black* v. *Sheraton Corp. of America*, 564 F.2d 531, 546 (D.C. Cir. 1977); *Frankel* v. *SEC*, 460 F.2d 813, 817-818 (2d Cir.), cert. denied, 409 U.S. 889 (1972).

[35] As the court observed in *PepsiCo, Inc.* v. *SEC*, 563 F. Supp. at 832, "[o]ne could readily envision investigations in which several targets raise separate objections to each subpoena an agency serves." See, *e.g.*, *United States* v. *Rylander*, No. 81-1120 (Apr. 19, 1983), slip op. 9-10 (procedural impediments resulted in a two-year delay before a recipient of an IRS summons was found in contempt for noncompliance).

[36] See, *e.g.*, *Reisman* v. *Caplin*, 375 U.S. 440 (1964) (action to enjoin third-party production); *Fugazy Continental Corp.* v. *NLRB*, 514 F. Supp. 718, 720-722 (E.D.N.Y. 1981) (court denied motion by subject of NLRB proceeding to intervene in subpoena enforcement action against third parties because subject had no interest in the subpoenaed material); *FSLIC* v. *First National Development Corp.*, 497 F. Supp. 724, 729, 732 (S.D. Tex. 1980) (court found that motions to intervene in subpoena enforcement action were "primarily motivated by [movants'] desire to impede the FSLIC investigation" and denied motions since movants did not have a protected interest in the subpoenaed books and records).

[37] See *Sprecher* v. *Graber*, 716 F.2d 968, 971 (2d Cir. 1983) (opposition to subpoena was "frivolous and interposed solely for delay"); *Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646, 647 (5th Cir. 1977) (affirming dismissal of action by target against FTC and third-party witnesses "to enjoin the FTC from enforcing the subpoenas and the [third-party witnesses] from voluntarily complying with them").

sult, the Commission and other law enforcement agencies "would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable" (*Hannah* v. *Larche*, 363 U.S. at 443).[38] As a district court stated in declining to follow the holding of the court of appeals below, a notice requirement would permit targets

> effectively to monitor the course and conduct of agency investigations. Experience and common sense should establish that such a power would be greatly abused, and that the limited resources presently available in our agencies to enforce the nation's public policies would be significantly reduced because of procedural maneuvering and other even less wholesome tactics.

PepsiCo, Inc. v. *SEC*, 563 F. Supp. at 832.

The requirement that persons under inquiry receive notice of subpoenas issued to witnesses also would inject substantial uncertainty into law enforcement and jeopardize pending investigations.[39] While requiring the provision of notice to "targets" when third-party subpoenas are served, the court of appeals made no effort to resolve such fundamental questions as the definition of a "target," the procedures for adjudicating whether a person or firm is a target, the rights of targets following receipt of notice, and the effect of noncompliance with the notice requirement.[40] See

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[38] As this Court stated in *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980), permitting premature judicial review of agency proceedings would result in "turning prosecutor into defendant" and would cause "interference with the proper functioning of the agency and a burden for the courts."

[39] Cf. *Berger* v. *New York*, 388 U.S. 41, 119 (1967) (Appendix to opinion of White, J., dissenting) (noting that confusion arising from judicial decisions and legislation concerning electronic eavesdropping inhibits law enforcement); *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 591-592 (1948) (footnote omitted) (the uncertainty concerning the outcome of a district court's unprecedented holding "might go far toward defeating the [Clayton] Act's effective application to the most serious and widespread offenses and offenders").

[40] For example, since the entry of the decisions below, persons whose conduct the Commission is investigating have requested additional "rights" consequent to notice, including the right to be present at the testimony of third-party witnesses, to have access to and copies

PepsiCo, Inc. v. *SEC*, 563 F. Supp. at 832. Even the threshhold question—what is a "target"?—is far from clear. The Commission itself does not use that term, and its inquiries generally focus on transactions rather than suspects.[41] Is a target any person or firm about whose activities evidence is gathered? Is it anyone suspected by the Commission staff? Is it anyone against whom sufficient evidence has been received to permit the initiation of administrative proceedings? Or the filing of an injunctive action? Or referral of the case for criminal prosecution?

And how are the courts to proceed when a party who has not received notice but claims to be a target seeks intervention in enforcement proceedings or initiates one of the "other appropriate district court proceedings" to which the court of appeals referred (App., *infra*, 7a)? Must the Commission disclose the evidence it has gathered and the investigative decisions it has made so that the correctness of its failure to provide target notice can be reviewed? While these and other issues are being resolved on a case-by-case basis, numerous Commission and other law enforcement investigations may be at risk.

For almost 50 years, the Securities and Exchange Commission has issued subpoenas without providing notice to the subjects of the investigation, and other investigative bodies have followed a similar practice since the beginning of the Republic. Such subpoenas have been routinely enforced by the federal courts. See *Hannah* v. *Larche*, 363

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of testimony and documents obtained by subpoena, and to suppress evidence obtained by the Commission without advance notice to them.

[41] For example, the Commission may investigate unusual trading preceding the announcement of a tender offer for the purpose of determining whether someone traded with advance knowledge of the tender offer in violation of antifraud provisions of the securities laws. In such a case, the thousands of traders who purchased stock of the target company in the days prior to the announcement may be potential subjects. And, in some such cases, the Commission is required to file an enforcement action before identifying all culpable persons. See, *e.g.*, *SEC* v. *Certain Unknown Purchasers of the Common Stock of, and Call Options for, the Common Stock of Santa Fe Int'l Corp.*, No. 81 Civ. 6553 (WCC) (S.D.N.Y. Nov. 13, 1981) (freezing assets in bank accounts).

U.S. at 442-444. If permitted to stand, the court of appeals' notice requirement, which reverses this historical practice without any demonstrated need, will cause grave difficulties for law enforcement that far outweigh any resulting benefits. *Ibid.*; see *United States* v. *Calandra*, 414 U.S. 338, 350-352 (1974).

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

LINDA D. FIENBERG
Associate General Counsel

HARRY J. WEISS
Special Trial Counsel

ELIZABETH A. SPURLOCK
Attorney

NOVEMBER 1983

ADDENDUM

Federal departments and agencies authorized to issue subpoenas or summonses without providing notice to "targets" include:

DEPARTMENT OF AGRICULTURE

Inspector General Act
—5 U.S.C. App. I, 6(a)(4)

United States Grain Standards Act
—7 U.S.C. 87f(a)

Packers and Stockyards Act
—7 U.S.C. 222

Poultry Products Inspection Act
—21 U.S.C. 467d

Perishable Agricultural Commodities Act
—7 U.S.C. 499m(c)

Tobacco Inspection Act
—7 U.S.C. 511n

Agriculture Adjustment Act of 1933
—7 U.S.C. 610(h)

Meat Inspection Act
—21 U.S.C. 677

Egg Products Inspection Act
—21 U.S.C. 1051

Agricultural Act of 1949, as amended 1980
—7 U.S.C. 1446(d)(5)

Federal Seed Act
—7 U.S.C. 1603(a)

Cotton Research and Promotion Act
—7 U.S.C. 2115

Animal Welfare Act
—7 U.S.C. 2146(c)

Potato Research and Promotion Act
—7 U.S.C. 2622

Egg Research and Consumer Information Act
—7 U.S.C. 2717

Beef Research and Information Act
—7 U.S.C. 2917

Wheat and Wheat Foods Research and Nutrition Education Act
—7 U.S.C. 3412

Swine Health Protection Act
—7 U.S.C. 3807(c)

Floral Research and Consumer Information Act
—7 U.S.C. 4317

Horse Protection Act
—15 U.S.C. 1825(d)

CIVIL AERONAUTICS BOARD

Federal Aviation Act of 1958
—49 U.S.C. 1484

DEPARTMENT OF COMMERCE

Inspector General Act
—5 U.S.C. App. 1, 6(a)(4)

China Trade Act, 1922
—15 U.S.C. 155

Weather Modification Reporting Act of 1972
—15 U.S.C. 330c(a)

Northern Pacific Halibut Act of 1982
—16 U.S.C. 773i(f)

Offshore Shrimp Fisheries Act of 1973
—16 U.S.C. 1100b-5(d)

Export Administration Act (anti-boycott and export control)
—50 U.S.C. App. 2411

COMMISSION ON CIVIL RIGHTS

Civil Rights Act of 1957
—42 U.S.C. 1975d(f) and (g)

COMMODITY FUTURES TRADING COMMISSION

Commodity Exchange Act
—7 U.S.C. 15

CONSUMER PRODUCT SAFETY COMMISSION

Consumer Product Safety Act
—15 U.S.C. 2076(b)(3)

Federal Hazardous Substances Act
—15 U.S.C. 1270

Flammable Fabrics Act
—15 U.S.C. 1193(c), 1194

DEPARTMENT OF DEFENSE

DOD Inspector General
—Pub. L. No. 97.252 (September 1982)

DEPARTMENT OF EDUCATION

Inspector General Act
—5 U.S.C. App. I, 6(a)(4)

DEPARTMENT OF ENERGY

Emergency Petroleum Allocation Act
—15 U.S.C. 754(a)(1)

Federal Energy Administration Act
—15 U.S.C. 772(e)(1)

DOE Inspector General
—42 U.S.C. 7138(g)

DOE Reorganization Act
—42 U.S.C. 7255

FEDERAL ENERGY REGULATORY COMMISSION

Interstate Commerce Act
—49 U.S.C. 12

Natural Gas Act
—15 U.S.C. 717m(c)

Federal Power Act
—16 U.S.C. 825(f)(b)

Natural Gas Policy Act of 1978
—15 U.S.C. 3418

ENVIRONMENTAL PROTECTION AGENCY

Federal Insecticide, Fungicide, and Rodenticide Act
—7 U.S.C. 136d(d)

Toxic Substances Control Act
—15 U.S.C. 2610(c)

Federal Water Pollution Control Act Amendments of 1972
—33 U.S.C. 1369(a)

Noise Control Act of 1972
—42 U.S.C. 4915(d)

Clean Air Act Amendments of 1977
—42 U.S.C. 7545(c), 7607(a), 7621(c)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the 1964 Civil Rights Act As Amended
—42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161(1)

Fair Labor Standards Act
—29 U.S.C. 209

FEDERAL COMMUNICATIONS COMMISSION

Communications Act
—47 U.S.C. 409(e), (f), and (g)

FEDERAL DEPOSIT INSURANCE CORPORATION

Financial Institutions Supervisor Act
—12 U.S.C. 1818(n)
—12 U.S.C. 1820(c)

FEDERAL ELECTION COMMISSION

Federal Election Campaign Act
—2 U.S.C. 437d(a)

FEDERAL HOME LOAN BANK BOARD

National Housing Act
—12 U.S.C. 1730(m)

FEDERAL LABOR RELATIONS AUTHORITY

Civil Service Reform Act of 1978
—5 U.S.C. 7132

Foreign Service Act of 1980
—22 U.S.C. 4107

FEDERAL MARITIME COMMISSION

Shipping Act
—46 U.S.C. 826(a)

FEDERAL TRADE COMMISSION

Federal Trade Commission Act
—15 U.S.C. 49

Federal Trade Commission Improvement Act
—15 U.S.C. 57b-1 (civil investigative demand)

Energy Policy and Conservation Act
—42 U.S.C. 6299(a)

FEDERAL RESERVE BOARD

Financial Institutions Supervisory Act
—12 U.S.C. 1818(n) and 1820(c)

Bank Holding Company Act
—12 U.S.C. 1844(F)

GENERAL ACCOUNTING OFFICE—COMPTROLLER GENERAL

Federal Energy Administration Act of 1974
—15 U.S.C. 771(b), (d) and (e)

Energy Policy and Conservation Act
—42 U.S.C. 6382(a), 6384(c)

Medicare-Medicaid Anti-Fraud And Abuse Amendments of 1977
—42 U.S.C. 1320a-4(a) and (b)

GENERAL SERVICES ADMINISTRATION

Inspector General Act
—5 U.S.C. App. I, 6(a)(4)

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Act
—42 U.S.C. 405(d) and (c)

HHS Inspector General
—42 U.S.C. 3525(a)

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Inspector General Act
—5 U.S.C. App. I, 6(a)(4)

Interstate Land Sales Full Disclosure Act
—15 U.S.C. 1714(c)

Fair Housing Act
—42 U.S.C. 3611(a)

National Manufactured Housing Construction and Safety Standards Act of 1974
—42 U.S.C. 5413(c) and (d)

DEPARTMENT OF INTERIOR

DOI Inspector General
—Pub. L. No. 97-357

Federal Oil and Gas Royalty Management Act of 1982
—30 U.S.C. 1717(a)

DEPARTMENT OF JUSTICE

Controlled Substances Act
—21 U.S.C. 876

Immigration and Nationality Act
—8 U.S.C. 1225(a)

Antitrust Civil Process Act
—15 U.S.C. 1312 (civil investigative demand)

Racketeer Influenced and Corrupt Organizations Act (RICO)
—18 U.S.C. 1968 (civil investigative demand)

DEPARTMENT OF LABOR

Inspector General Act
—5 U.S.C. App. I, 6(a)(4)

Fair Labor Standards Act
—29 U.S.C. 209

Labor-Management Reporting and Disclosure Act
—29 U.S.C. 521(b)

Employee Retirement Income Security Act
—29 U.S.C. 1134(c)

MERIT SYSTEMS PROTECTION BOARD (Special Counsel)

Civil Service Reform Act of 1978
—5 U.S.C. 1205(b)(2)(A)

NATIONAL CREDIT UNION ADMINISTRATION

Federal Credit Union Act
—12 U.S.C. 1784

NATIONAL LABOR RELATIONS BOARD

Labor-Management Relations Act
—29 U.S.C. 161(1)

NATIONAL TRANSPORTATION SAFETY BOARD

Transportation Safety Act of 1974
—49 U.S.C. 1903(b)

Federal Aviation Act
—49 U.S.C. 1004, 1484(b)

NUCLEAR REGULATORY COMMISSION

Atomic Energy Act
—42 U.S.C. 2201c

PENSION BENEFIT GUARANTY CORPORATION

Employee Retirement Income Security Act of 1974
—29 U.S.C. 1303(b)

SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
—15 U.S.C. 77s(b)

Securities Exchange Act of 1934

—15 U.S.C. 78u(b)

Public Utiliy Holding Company Act
—15 U.S.C. 79r(c)

Trust Indenture Act of 1939
—15 U.Ss.C. 77uuu(a)

Investment Company Act of 1940
—15 U.S.C. 80a-40(b)

Investment Advisers Act of 1940
—15 U.S.C. 80b-9(b)

SMALL BUSINESS ADMINISTRATION

Small Business Act
—15 U.S.C. 634(b)(11)

Small Business Investment Act of 1958
—15 U.S.C. 687b(a)

SYNTHETIC FUELS CORPORATION

SFC Inspector General
—42 U.S.C. 8718(e)

DEPARTMENT OF STATE

State Inspector General
—22 U.S.C. 3929(a)

DEPARTMENT OF TRANSPORTATION

National Traffic and Motor Vehicle Safety Act of 1966
—15 U.S.C. 1401(c)

Motor Vehicle Information and Cost Savings Act Amendment of 1976
—15 U.S.C. 1914(a)
—15 U.S.C. 1990d(c)
—15 U.S.C. 2005(b)

Act to Prevent Pollution From Ships
—33 U.S.C. 1907(b)

Railroad Safety Appliance Acts
—45 U.S.C. 35, 40

Federal Railroad Safety Act of 1970
—45 U.S.C. 437(a)

Motor and Rail Carrier Safety Acts
—49 U.S.C. 502(d), (e)

Merchant Marine Act
—46 U.S.C. 1124(a)

Port and Tanker Safety Act

—33 U.S.C. 1227

Outer Continental Shelf Lands Act Amendments of 1978
—43 U.S.C. 1348(f)

Federal Aviation Act of 1958
—49 U.S.C. 1354(c)
—49 U.S.C. 1484

Natural Gas Pipeline Safety Act of 1968, as amended
—49 U.S.C. 1681(a)

Hazardous Materials Transportation Act
—49 U.S.C. 1808(a)

Hazardous Liquid Pipeline Safety Act
—49 U.S.C. 2010(a)

Investigation of Marine Casualties
—46 U.S.C. 239(e), recodified in 46 U.S.C. 7705 (Pub. L. No. 98-89, 97 Stat. 500)

DEPARTMENT OF THE TREASURY

Financial Institutions Supervisory Act (Comptroller of the Currency)
—12 U.S.C. 1818(n)
—12 U.S.C. 1820(c)

Tariff Act of 1930
—19 U.S.C. 1509

Narcotics Drug Import and Export Acts
—21 U.S.C. 967

Internal Revenue Code
—26 U.S.C. 5274
—26 U.S.C. 7602

Federal Alcohol Administration Act
—27 U.S.C. 202(c)

Trading with the Enemy Act
—50 U.S.C. App. 5(b)

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 82-3108, 82-3109 and 82-3185

JERRY T. O'BRIEN, INC., DOING BUSINESS AS PENNALUNA & CO., ET AL., PLAINTIFFS-APPELLANTS.

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL., DEFENDANTS-APPELLEES,

and

HARRY F. MAGNUSON AND H.F. MAGNUSON & COMPANY, CROSS-PLAINTIFFS-APPELLANTS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL., CROSS-DEFENDANTS-APPELLEES.

Filed Apr. 25, 1983

Appeal from the United States District Court
for the Eastern District of Washington

Before SKOPIL, PREGERSON, and FERGUSON, Circuit Judges.

PREGERSON, Circuit Judge:

I

The Securities and Exchange Commission (SEC) moved the district court to dismiss appellants' claims for injunctive relief. The court granted the motion after concluding that agency-initiated subpoena enforcement proceedings afforded appellants an adequate legal remedy. This appeal followed. Appellate jurisdiction is based on 28 U.S.C. § 1292(a)(1).

Since this appeal presents only questions of law, our review is *de novo*. *State of Oregon, Division of State Lands v.*

Riverfront Protection Association, 672 F.2d 792, 794 (9th Cir. 1982).

The relevant factual background may be summarized briefly. In September 1980, the SEC issued a Formal Order of Investigation (FOI) "In the Matter of H.F. Magnuson & Co."[1] The FOI stated that "Magnuson, Pennaluna & Co., Inc., Benjamin A. Harrison, corporations headquartered at H.F. Magnuson & Co., and *others*" (emphasis added) were suspected of engaging in securities violations. Neither Jerry T. O'Brien nor Jerry T. O'Brien, Inc., doing business as Pennaluna & Co., was named in the FOI. Subsequently, however, the SEC informed O'Brien's attorney that Jerry T. O'Brien, Inc., was "under consideration as being one of the 'others' engaged" in the suspected violations.

The FOI authorized SEC personnel to investigate the parties targeted by the FOI for a variety of securities laws violations including insider trading; failing to file certain required statements with the SEC; filing false or misleading annual reports, proxy statements, or ownership statements; and engaging in stock sales in violation of the antifraud provisions of the Securities Act of 1933.[2] The FOI also empowered certain SEC personnel to subpoena witnesses, documents, and other information. The SEC served

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[1] This order was issued pursuant to the Securities Act of 1933, 15 U.S.C. § 77s(b), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78u(a); 78u(b). Before an FOI is issued, SEC personnel conduct preliminary or informal investigations during which "no process is issued [nor] testimony compelled." 17 C.F.R. § 202.5. Thereafter, the Commission "may, in its discretion, make such formal investigations and authorize the use of process as it deems necessary." *Id.* An FOI launches the formal investigation, defines its scope, and establishes limits within which investigative staff may resort to process. *See SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023 (D.C. Cir. 1978).

[2] Including possible violations of the Securities Act of 1933 sections 5(a), 15 U.S.C. § 77e(a); 5(c), 15 U.S.C. § 77e(c); 17(a), 15 U.S.C. § 77q(a); and the Securities and Exchange Act of 1934 sections 10(b), 15 U.S.C. § 78j(b); 13(a), 15 U.S.C. § 78m(a), 13(d), 15 U.S.C. § 78m(d); 13(g), 15 U.S.C. § 78m(g); 14(a), 15 U.S.C. § 78n(a); 16(a), 15 U.S.C. § 78p(a); and rules promulgated thereunder. 17 C.F.R. §§ 240.10b-5; 240.13a-1; 240.13d-1; 240.13d-2; 204.14a-3; 204.14a-9; 240.16a-1.

subpoenas on Jerry T. O'Brien, Inc., and on several individuals and entities not targeted by the investigation.[3]

Appellants sought to enjoin the investigation because they thought it was conducted improperly. In granting the SEC's motion, the district court concluded that appellants were not entitled to injunctive relief because they had an adequate remedy at law—the issues they raised could be litigated in subpoena enforcement proceedings initiated by the SEC under 15 U.S.C. § 78u(c).

II

Appellants' challenges to the SEC's investigation fall into two categories: those that involve SEC actions aimed directly at appellants, and those that involve SEC subpoenas served on non-parties to the investigation.

A. *SEC actions directed at appellants*

The district court correctly concluded that appellants had an adequate legal remedy in which to resist the SEC subpoenas served on them. This remedy was adequate because an SEC subpoena is not self-executing. A recipient of an SEC subpoena may refrain from complying with it, without penalty, until directed otherwise by a court order. *See Donaldson v. United States*, 400 U.S. 517, 523-25, 91 S.Ct. 534, 538-39, 27 L.Ed.2d 580 (1971).[4] A court will not en-

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[3] Any relief accorded Jerry T. O'Brien, Inc., would accrue to Jerry T. O'Brien as an individual, and for all practical purposes any claims asserted by him as an individual are moot.

[4] The possibility of excesses in the conduct of agency investigations may explain why agency subpoenas are not self-executing but require judicial enforcement when a recipient of a subpoena does not voluntarily comply. *See, e.g., Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 219, 66 S.Ct. 494, 510, 90 L.Ed. 614 (Murphy, J., dissenting) ("To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of [the subpoena] power.... Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty."). *See also id.* at 206 n.37, 66 S.Ct. at 504 n. 37; *United States v. DeGrosa*, 405 F.2d 926, 929 (3d Cir. 1969) (Constitution requires opportunity for judicial review prior to penalties for non-compliance with administrative subpoenas).

force an SEC subpoena directed at the target of an investigation unless the agency, at an evidentiary hearing, demonstrates that it has complied with the requirements of *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). These are that (1) the agency has a legitimate purpose for the investigation; (2) the inquiry is relevant to that purpose; (3) the agency does not possess the information sought; and (4) the agency has adhered to administrative steps required by law. *Id.* at 57-58, 85 S.Ct. at 254-55;[5] *Lynn v. Biderman*, 536 F.2d 820, 824 (9th Cir.), *cert. denied sub nom. Biderman v. Hills*, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976). Thus, appellants have an adequate legal remedy with regard to subpoenas served on them.[6]

B. *The target's right to challenge SEC subpoenas served on non-parties*

Ordinarily, "parties summoned [by an administrative subpena] and those affected by a disclosure may appear or intervene before the District Court and challenge the summons." *Reisman v. Caplan*, 375 U.S. 440, 445, 84 S.Ct. 508, 511, 11 L.Ed.2d 459 (1963). The SEC noted correctly in oral argument that the Supreme Court has since limited this precept. Such intervention "is permissive only and is not mandatory. The language recognizes that the District Court ... *may* allow the [target of the investigation] to intervene." *Donaldson v. United States*, 400 U.S. at 529-30, 91 S.Ct. at 541-42 (emphasis added). Thus, when "an ad-

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[5] Although *Powell* involved the Internal Revenue Service, the *Powell* standards have been extended to SEC investigations, as well as those of other administrative agencies. *E.g., Lynn v. Biderman*, 536 F.2d 820, 824 (9th Cir.), *cert. denied sub nom. Biderman v. Hills*, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976); *SEC v. ESM Gov't Securities, Inc.*, 645 F.2d 310, 313 (5th Cir.1981). *But see id.* at 313 ("We do not suggest that every aspect of the law regarding an IRS summons controls an SEC subpoena.").

[6] District court review of the propriety of SEC actions in its investigation would also have been inappropriate because "final agency action," a prerequisite to judicial review, had not yet occurred. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980).

ministrative summons is issued to a third party," the person being investigated "*may* attempt to restrain voluntary compliance by the third party, assuming [the target] is aware of the issuance of the summons prior to compliance ...." *United States v. Genser*, 582 F.2d 292, 300 (3d Cir. 1978) (emphasis added).

Appellants contend that third-party subpoena enforcement proceedings do not afford targets an adequate legal remedy unless the agency notifies them of the identities of the subpoenaed third parties. Appellants stress that the lack of such notice denies targets of an investigation the opportunity even to seek permissive intervention in enforcement proceedings. They point out further that some of the unidentified parties probably lack the ability, resources, or motive to challenge the subpoenas, especially since the investigation implicates persons other than themselves. Moreover, SEC subpoenas do not inform recipients of their right to resist; rather, the subpoenas suggest that failure to comply will result in penalties.[7] Appellants argue that, unless they are given notice of and an opportunity to seek intervention in any proceeding to enforce third-party subpoenas, the agency could circumvent the protections afforded by *United States v. Powell*.

The SEC argues that appellants lack standing to challenge subpoenas issued to third parties, and the district court so held.[8] Barring questions of privilege or other spe-

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[7] *See Oklahoma Press Publishing Co.*, 327 U.S. 186, 219, 66 S.Ct. 494, 510, 90 L.Ed. 614 (1946) (Murphy, J., dissenting) ("Many persons have yielded [to an administrative subpoena] solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary even intervening."). Indeed, the third party subpoenas in this case warned each recipient that he was "hereby required to appear" before a designated SEC officer and "required to bring ... and produce at said time and place" the documents delineated. Each subpoena contained the cryptic admonition, "Fail not at your peril."

[8] The SEC also asserts that courts may not impose procedural requirements upon agencies. However, the case cited by the SEC, *Steadman v. SEC*, 450 U.S. 91, 104, 101 S.Ct. 999, 1009, 67 L.Ed.2d 69 (1981), does not support this assertion. In fact, the courts have

cial circumstances, it is true that appellants have no right to protect or withhold documents held by a third party. *Donaldson*, 400 U.S. at 523, 91 S.Ct. at 538. *See United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). But appellants, as targets of the investigation, do have a right to be investigated consistently with the *Powell* standards. *Cf. Powell*, 379 U.S. at 57-58, 85 S.Ct. at 254-55. As a practical matter, this is a right that only appellants would assert.

Cases involving the question of standing to object to agency process have arisen primarily in the context of IRS summonses. The Second Circuit has held that taxpayers lack standing to object to enforcement of an IRS summons directed to a third party because the taxpayers neither own nor possess the items sought by the IRS. *Foster v. United States*, 265 F.2d 183, 188 (2d Cir.), *cert. denied*, 360 U.S. 912, 79 S.Ct. 1297, 3 L.Ed.2d 1261 (1959). The Supreme Court has stated as a "general rule that the issuance of a subpoena to a third party to obtain the records of that party does not [itself] violate the rights of a defendant." *Miller*, 425 U.S. at 444, 96 S.Ct. at 1624. The Ninth Circuit had earlier stated that "customers have no standing to object to [grand jury or other] subpoenas requiring their banks to produce records of the customers' accounts." *Harris v. United States*, 413 F.2d 316, 318 (9th Cir.1969).

For at least two reasons this lack of standing rule has no application in the present matter.[9] The cases holding that

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ruled to the contrary. *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 951 (9th Cir. 1976); *FTC v. Turner*, 609 F.2d 743, 745 (5th Cir. 1980) (agencies are bound by Federal Rules of Civil Procedure when in federal courts); *But see Hoving Corp. v. FTC*, 290 F.2d 803, 807 (2d Cir. 1961) (court will not dictate to agency regarding minor procedural technicality).

[9] A district court articulated part of the problem of a rule denying targets standing to object to third party subpoenas:

> [T]he more important problem which troubles this court is the practical disadvantage which falls upon the [target] in this situation. *Reisman v. Caplan* ... and the cases which follow it ... are based upon the premise that the summons may not be enjoined in equity because the taxpayer retains an adequate remedy at law—intervention in the government's suit to enforce the summons. But for this legal remedy to become more than a fiction it is

targets lack standing to object to process issued to third parties do so based on the premise that targets have no right to maintain the confidentiality of information held by third parties. *E.g.*, *Miller*, 425 U.S. at 444, 96 S.Ct. at 1624; *Harris*, 413 F.2d at 318. This premise is irrelevant to the present case. While appellants lack any right to maintain confidentiality of information held by third parties, they do have the right to be investigated consistently with the *Powell* standards. To assure that the target has the opportunity to assert this right, notice of third-party subpoenas is necessary.

Third-party recipients of agency process appear to lack standing to require an agency to conduct its investigation of a target consistently with *Powell*. *See Sierra Club v. Morton*, 405 U.S. 727, 733, 734-35, 92 S.Ct. 1361, 1365, 1365-66, 31 L.Ed.2d 636 (1972). Thus, denying the target notice of agency process issued to third parties necessarily denies the target the ability to assert its right to be investigated consistently with *Powell*. The target's right could be asserted by seeking permissive intervention in enforcement proceedings brought by the agency against the third party or by other appropriate district court proceedings. As a practical matter, unless the target of an SEC investigation receives notice of subpoenas served on third parties, no one will question compliance with the *Powell* standards as to those subpoenas.

Notice to targets of third-party subpoenas need not unduly burden the agency or the courts. Compliance with *Powell* can be determined on the basis of affidavits. *See Lynn v. Biderman*, 536 F.2d 820, 823 (9th Cir. 1976). Such notice will merely afford targets an opportunity to question whether agency actions comply with *Powell*.

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necessary for the third party upon whom the summons has been issued ... to refuse to obey the summons' command. As a practical matter, few ... ever contest a .... summons .... What is significant is that the taxpayer's "adequate remedy at law" is often hollow in practical reality.

Kirschenbaum v. Beerman, 376 F. Supp. 398, 399-400 (W.D.Pa.1974). The court went on to hold, however, that taxpayers lacked standing to seek an injunction prohibiting their banks from producing information to the IRS. *Id.* at 400.

The Supreme Court has observed:

> Since a person may ... be wholly unaware of the fact that he is being investigated until his friends who are interviewed so inform him, and since this may sometimes give rise to antagonism and a feeling that the [Securities & Exchange] Commission is besmirching him behind his back, no reason is apparent why, simply as a matter of good will, the [SEC] should not in ordinary cases send a copy of its order for investigation to the person under investigation.

Hannah v. Larche, 363 U.S. 420, 447 n.26, 80 S.Ct. 1502, 1517 n. 26, 4 L.Ed.2d 1307 (1959) (quoting Attorney General's Committee on Administrative Procedure, Monograph, Securities Exchange Commission 34-41). Absent special circumstances involving a serious threat to the integrity of the investigation, this rationale should apply as well to service of agency subpoenas on third parties.

III

As to subpoenas directed to appellants as targets, subpoena enforcement proceedings provide an adequate forum in which to challenge the SEC's conduct vis-a-vis the *Powell* standards. But as to third-party subpoenas, appellants for all pretrial purposes will be denied an adequate forum unless the SEC gives them notice of the third-party subpoenas. Because such notice was not given, the district court's order as it relates to third-party subpoenas is reversed and the case remanded for proceedings consistent with the views herein expressed.

AFFIRMED in part, REVERSED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-81-546 RJM

JERRY T. O'BRIEN, INC., D/B/A/ PENNALUNA & CO., JERRY T. O'BRIEN, BENJAMIN A. HARRISON, AND PENNALUNA & COMPANY, INC., PLAINTIFFS,

v.

SECURITIES AND EXCHANGE COMMISSION, DEFENDANTS.

HARRY F. MAGNUSON, AND H. F. MAGNUSON AND COMPANY, CROSS-PLAINTIFFS,

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL., CROSS-DEFENDANTS

[Filed Mar. 25, 1982]

MEMORANDUM AND ORDER

By Order of this Court dated January 20, 1982, plaintiffs[1] were denied injunctive relief against subpoenas currently outstanding, or which may be issued in the future, pursuant to SEC Order of Investigation S-1555. The parties now seek a clarification of this earlier Order with respect to the status of claims at law asserted. Plaintiffs have also brought on motions for injunctive relief restraining the agency from pursuing subpoenas issued to third persons not party to this suit,[2] and further, for a stay pending appeal pursuant to F.R.C.P. 62(c).[3]

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[1] For the sake of convenience, both plaintiffs and cross-plaintiffs will be referred to collectively as "plaintiffs" unless otherwise indicated.

[2] In the original complaint, plaintiffs asked that cross-plaintiffs be restrained from complying with various subpoenas. As the case progressed, it became clear that Magnuson would not voluntarily comply. By the time of hearing, if this topic was at issue at all, it was only marginally so. Consequently the subject was not addressed in the earlier Order and Memorandum.

[3] Motion was also made to compel discovery but it is my understanding that the parties have settled on a schedule acceptable to all.

I. Legal Claims

With regard to legal claims set forth in both the original and amended complaints and cross-complaints, there appear to be potential jurisdictional issues. These remain unsettled pending full briefing by the parties.

II. Third Party Injunctive Relief

The request for injunctive relief against third party subpoenas presents several truly novel questions. Process issued pursuant to an order of investigation is not self-executing. *United States v. Powell*, 379 U.S. 48 (1964). The party subject to a subpoena is free to resist and put the government to its proof through a judicial enforcement proceeding. *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980). For the SEC to prevail, the court must conclude that agency process: (1) has been issued in pursuit of a legitimate purpose as authorized by Congress; (2) is relevant to that purpose; (3) does not seek information already in the agency's possession; and (4) is issued in accordance with proper administrative steps. *United States* v. *Powell*, *supra*, at 57-58.

Denial of injunctive relief in the initial Order was predicated upon the foregoing considerations. The existence of an adequate remedy at law in the form of an enforcement hearing would clearly render extraordinary relief unavailable. *Howfield, Inc. v. United States*, 409 F.2d 694, 697 (9th Cir. 1969). Since this Order issued, however, the SEC has waged an aggressive investigation, issuing numerous subpoenas in the Spokane area to various mining companies and brokers. Plaintiffs contend that the subject matter sought under these subpoenas is in substance the same as that sought under the subpoenas issued directly to the parties in this action. It is argued that the SEC is attempting an "end run" around the procedural safeguards set forth in *Powell*.

In support, plaintiffs rely heavily upon two authorities. In *Reisman v. Caplin*, 375 U.S. 440 (1964), the Supreme Court noted:

> [T]hird parties might intervene [in enforcement proceedings] to protect their interests, or in the event the

> taxpayer is not a party to the summons before the hearing officer, he, too, may intervene....
>
> Nor would there be a difference should the witness indicate ... that he would voluntarily turn the papers over to the Commissioner. If this be true, either the taxpayer or any affected party might restrain compliance ... until compliance is ordered by a court of competent jurisdiction.

Id. at 449-50 (citations omitted).

This language suggests an inherent problem, however, in that before one may intervene in a third party enforcement proceeding, or act to restrain a third party from voluntary compliance, it is necessary that one first know of the existence of such process. The dilemma is framed in the following quote:

> Where an administrative summons is issued to a third party, such as a taxpayer's bank, the taxpayer may attempt to restrain voluntary compliance by the third party, *assuming that he is aware of the issuance of the summons prior to compliance*, and he may challenge the validity of the summons by attempting to intervene in the ensuing enforcement proceedings.

United States v. Genser, 582 F.2d 292, 300-01 (3d Cir. 1978) (emphasis added).

The natural query at this juncture is what protections exist for the ostensible "target"[4] of an investigation if he is *not* aware of process outstanding against third parties. Plaintiffs suggest that the only effective remedy would be to require notice to those under investigation whenever such process is issued. The argument is not without appeal. It would be relatively easy to project a hypothetical where a government agency could effectively render the *Powell* protections a nullity. On the other hand, with equal facility, one could envision a situation where a legitimate investigation could be thwarted by the shear weight of logistics and paperwork necessary to apprise all those who may come under individualized scrutiny as a result of third

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[4] The term "target" is used advisedly. Plaintiffs imply that this Court "found" plaintiff O'Brien to be improperly targeted. Such a reading ignores footnote 2 of the earlier Order.

party process. In fairness to the plaintiffs, they do not purport to represent such a class and ask only for notice to themselves. Nonetheless, I am not inclined to fashion such a novel remedy under the facts as presently framed.

Plaintiffs rely heavily upon IRS cases in which a taxpayer under investigation has had his records subpoened under third party process issued to those to whom he has entrusted such information. There is an obvious and blatant unfairness in allowing the IRS to take advantage of the trust engendered by a relationship of an arguably confidential and sometimes fiducial nature. Indeed, in the context of IRS proceedings, Congress has recognized such inequity by enacting 26 U.S.C. § 7609 which provides for just such notice as is requested here where the information sought is in the hands of the taxpayer's bank, accountant, or attorney, as well as others with whom a confidential relationship may exist. Plaintiffs' analogy fails at this point, however, because the third parties currently under subpoena do not stand in the same posture with respect to the "target" as do those persons encompassed in § 7609. It would be stretching the IRS cases beyond their breaking point to argue that plaintiffs retained a legitimate expectation of privacy in their business transactions with the various mining companies and brokerages now under subpoena.[5] This is all the more true in a highly regulated field such as securities.

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[5] This is not to say that case law framing the procedural methodology of enforcing process issued by the IRS may not be relevant in the instant case.

> We assume, as do the parties, that the same standards are applicable to enforcement of SEC subpoenas as Internal Revenue Summonses. Thus, the subpoena issued by the Securities and Exchange Commission, 15 U.S.C. § 78u, like the administrative subpoena issued by the Federal Trade Commission, 15 U.S.C. § 49, and the Interstate Commerce Commission, 49 U.S.C. § 20 ¶ 6, as well as the administrative summonses issued under § 7602 of the Internal Revenue Code, I.R.C. § 7602, is subject to the same judicial scrutiny prior to enforcement.
>
> *SEC v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118, 123 n.5 (3d Cir. 1981).

In the case at hand, however, the distinction is one of substance, not procedure. *See SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 313 n.3 (5th Cir. 1981) and cases cited therein.

The information sought does not "belong" to plaintiffs in the sense that they have a continuing protectable interest in its confidentiality. Rather, it "belongs" to those persons subject to subpoena, and those persons may elect to comply or resist independently of plaintiffs' asserted interests. *See generally, Donaldson v. United States*, 400 U.S. 517, 527-31 (1971).

In a word, plaintiffs have no blanket standing to intervene simply because information sought may have some relationship to their business activities. It follows that no blanket right to notice exists when such information is sought. This is not to say that a hypothetical situation could not arise in the future where the policy underlying *Reisman* might apply with equal force to an SEC subpoena directed to a "target's" confidant, but the facts as currently framed do not now support a conclusion of standing.

It could be argued, and is by defendants, that the claim of inadequate remedies at law is a red herring under the rule enunciated in *SEC v. Laird*, 598 F.2d 1162 (9th Cir 1979):

> We are equally unpersuaded by the argument that information may come from this investigatory procedure which could subsequently be used in a civil or fraud suit. "Appellants may adequately protect their asserted interests by seeking to suppress such information in any subsequent proceeding."

Id. at 1163 (citations omitted).

It is less than crystal clear that the facts of the instant case are on direct point with *Laird*, but the thrust of that decision is unmistakable in pointing out that an adequate remedy at law may well be remedial in nature rather than preventive. Thus, on alternative bases of lack of standing and also the existence of adequate legal procedures, plaintiffs' attempt to impose a notice requirement with respect to third party process must be denied.

III. Stay Pending Appeal

Plaintiffs have appealed the Order of January 20, 1982. They have further indicated that should their present motions be determined adversely, these too will be appealed. It is my understanding that an attempt will be made to con-

solidate and that the SEC will not oppose such motion. Plaintiffs argue that absent a stay pending appeal pursuant to F.R.C.P. 62(c), the issues raised will become moot. Mootness in and of itself, however, is not the type of irreparable harm which would render injunctive relief appropriate. *Jimenez v. Barber*, 252 F.2d 550 (9th Cir.), *cert. denied*, 355 U.S. 943 (1958). The test, rather, is as outlined in *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549 (9th Cir. 1977):

> The considerations in determining whether to grant or deny the requested relief are threefold: (1) Have the Movants established a strong likelihood of success on the merits? (2) Does the balance of irreparable harm favor the Movants? (3) Does the public interest favor granting the injunction? As the Eighth Circuit has pointed out, the latter criteria merge into a single equitable judgment in which the ... concerns of the movants must be weighed against the societal interests which will be adversely affected by granting the relief requested, a process which must be significantly affected by the realities of the situation.

Id. at 551 (citations omitted).

In pursuing this multi-stage inquiry, I must consider: (1) the substantiality of the issues to be appealed; (2) the nature of harm likely to be sustained by the parties both in the event a stay is granted and if it is not; (3) the public interest to be served or harmed by a stay; and (4) the latter two concerns must be balanced against the first.

A. The Merits of the Issues

For reasons covered in this memorandum and in that of January 20, I am not convinced that the plaintiffs will ultimately prevail on the merits. The *Warm Springs* test, however, should not be read to place the trial judge in the wholly untenable position of first ruling on the merits and then predicting that he will be overturned. The appropriate framework, rather, would seem to be that enunciated in *Ruiz v. Estelle*, ___ F.2d ___, slip. op. 820, 822-23 (5th Cir. January 14, 1982). This decision stands for the proposition that, under proper facts, a court may consider the ***substantiality*** of the issues rather than pass on the arithmetic

probabilities of eventual success. *See also Providence Journal v. Federal Bureau of Investigation*, 595 F.2d 889 (1st Cir. 1979); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F.2d 841, 843 (D.C. Cir. 1977).

While I have concluded that an SEC investigation is distinguishable from the authority cited by plaintiffs, and that they do not have standing under the facts alleged, I cannot say with certainty that this heretofore unresolved question could not be determined otherwise on appeal. The issue is intriguing, eminently arguable, and certainly substantial in the sense that the questions raised should be authoritatively determined.

B. Harm

Should a stay be denied, movants' position will be mooted. Mootness is not itself a cognizable harm. *Jimenez v. Barber, supra.* The effect of that mootness, however, may well be weighed. Plaintiffs argue that if the SEC enjoys success in its present tact of proceeding on third party subpoenas, the entire history of judicial protection against process issued in bad faith or beyond the scope of an order of investigation will be reduced to a nullity. This position is colorable. If the movants should eventually prevail, they will have sustained substantial and irreparable harm during the interim in the absence of a stay.

The harm to the SEC is somewhat more amorphous. Any judicial interference in a legitimate investigation is, of course, harmful. The nature and scope of that harm would be dependent upon a multitude of factors, such as, the breadth of any restrainment, and the length of time a stay may be in effect. For example, an indeterminate stay pending review on the merits may seriously impede the ability of the SEC to fulfill its congressionally mandated function. A stay of several weeks, on the other hand, will be merely an inconvenience of minor import.

C. The Public Interest

In many respects, the public interest is inextricably intertwined with the interests of the SEC since, presumably,

that agency exists only to serve social goals. Thus, much the same type of harm likely to accrue to the SEC will also be visited upon the public. At the same time, however, society has a more expansive stake in that the continuing efficiency of government agencies such as the SEC, and the need to ensure that such agencies operate within the confines of the law, are of substantial interest to the public.

D. Balancing the Criteria

In viewing the substantiality of the issues, the risk of imminent and irreparable harm to the movants, the public interest in obtaining dispositive resolution of the issues, and the slight risk of harm likely to be sustained by the SEC during a brief stay, IT IS HEREBY ORDERED

that a stay of fourteen days is granted during which time movants may petition the Court of Appeals for a stay pending appeal pursuant to Ninth Circuit Rule 6(i);

that during this period the SEC shall not attempt to enforce any process currently pending under Order S-1555; nor shall any information be solicited from those to whom process under said Order has thus far been directed; nor shall such information be accepted if voluntarily profered.

IT IS SO ORDERED

DONE BY THE COURT this 25th day of March, 1982

/s/ Robert J. McNichols

ROBERT J. MCNICHOLS
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-81-546

JERRY T. O'BRIEN, INC. d/b/a/
PENNALUNA & CO., ET AL., PLAINTIFFS,

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
DEFENDANTS,

HARRY F. MAGNUSON AND
H.F. MAGUSON AND COMPANY, CROSS-PLAINTIFFS,

v.

SECURITY AND EXCHANGE
COMMISSION, ET AL., CROSS-DEFENDANTS.

[Filed Jan. 20, 1982]

OPINION AND ORDER

I. Statement of the Case

Plaintiffs[1] ask equitable relief which contemplates enjoining the SEC from proceeding further on various outstanding subpoenas as well as other aspects of an ongoing investigation. The government currently has pending before this court a motion to dismiss all claims for lack of subject matter jurisdiction, insufficiency of service of process, and failure to state a claim for which relief can be granted.

II. General Background

A subpoena issued by the SEC is not self-executing. If resisted, only the courts have authority to enforce such process. *United States v. Powell*, 379 U.S. 48 (1964). The

[1] For simplicity's sake, plaintiffs Jerry T. O'Brien, Inc. d/b/a Pennaluna & Co., Jerry T. O'Brien, Benjamin A. Harrison, Pennaluna and Company, Inc., and cross-plaintiffs Harry F. Magnuson and H.F. Magnuson and Company will all be referred to collectively as "plaintiffs" unless otherwise denoted in the text.

primary concern of the court, when applying the criteria outlined below, should be the maintenance of judicial integrity by ensuring that its powers are not misused by the government to effect an abuse of process. *Powell, supra*, at 58; *United States v. Goldman*, 637 F.2d 664 (9th Cir. 1980). The burden of demonstrating abuse falls upon the person resisting the summons or subpoena. *United States v. Church of Scientology*, 520 F.2d 818, 824 (1975).

The inquiry in this case is two-fold: (1) the validity of the subpoenas (and the underlying investigation); and (2) whether pre-emptive attack on validity is appropriate. While economy would seem to dictate that only those tests relevant to pre-emptive attack be explored, these two areas of inquiry are not subject to neat segregation. It will be necessary, therefore, to take a somewhat more circuitous route and consider first, the validity of the subpoenas as though the case had progressed to the enforcement stage, and only then view the appropriateness of the extraordinary relief requested by plaintiffs in this pre-emptive attack.

III. Validity of Subpoenas

As an initial proposition, a regulatory agency need not establish probable cause in support of its investigatory endeavors. Such an agency "can investigate merely on suspicion that the law is being violated, *or even just because it wants assurance that it is not.*" *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (emphasis added). This is not to say that regulatory agencies have carte blanche authority beyond review. Courts have endeavored to construct a framework whereby validity may be tested, while at the same time avoiding undue burdens upon investigatory functions. To survive judicial review, agency process must: (1) be issued in pursuit of a legitimate purpose as authorized by Congress; (2) be relevant to that purpose; (3) not seek information already in the agency's possession; and (4) be issued in accordance with proper administrative steps. *Powell, supra*, at 57-58.

A. Legitimate Purpose

The government bears the initial burden of showing legitimate purpose. *United States v. Stuckey*, 646 F.2d 1369, 1374 (9th Cir. 1981). That burden is not a substantial one, however, and a prima facie case may be made out of little more than mere mechanical recitation of congressionally-authorized functions. *See e.g., United States v. Wyatt*, 637 F.2d 293, 301 (5th Cir. 1981). Once a threshold showing is made, the burden shifts to the person resisting enforcement to prove that the summons or subpoena in issue was promulgated in bad faith and designed to accomplish a purpose not within the contemplation of legislative intent. *See LaSalle v. National Bank*, 437 U.S. 298, 307-08 (1978).

I am satisfied that the order dated September 3, 1980 states a legitimate purpose for the investigation in section II, G with respect to all plaintiffs except O'Brien, in both his personal and corporate capacity,[2] who is not named [hereinafter referred to collectively as O'Brien].

B. Relevancy to Purpose

There are no "bright lines" distinguishing the relevant from the irrelevant. It is axiomatic that there must be some articulable nexus between the announced purpose and the information sought. Put another way, the government must be prepared to show that the subject matter of the subpoena "might have thrown light" on suspected wrongdoing. *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980). Relevance is tested against the query of whether there exists "a realistic expectation rather than an idle hope that something may be discovered." *Id.* (quoting *United States* v. *Harrington*, 388 F.2d 520, 524 (2nd Cir. 1969)). Although a nice turn of phrase, this admonition is not particularly instructive.

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[2] The distinction drawn in brief and oral argument between Pennaluna & Co., Inc. and Pennaluna & Co. may be an exercise in semantical speciosity. Since the difference, if any, between these companies is irrelevant for purposes of disposing of this motion, O'Brien's claim that he was not named in the investigation order in either his personal or corporate capacity will be assumed but not decided.

More concrete is the position taken by some courts that "purpose" and "relevance" must be construed together.

> [T]he Board must disclose its purpose to enable a court to make an determination of relevance. Otherwise no inquiry "into the underlying reasons for the examination" .... is possible. This obligation is of course not satisfied by the recital that the purpose of the investigation is to determine compliance with the law. The same could be said for any general warrant.

CAB v. United Airlines, Inc., 542 F.2d 394, 402 (7th Cir. 1976) (citation omitted).

With respect to relevance, I am satisfied that section III of the order initiating investigation states a reasonable nexus between the purpose and the parties except for plaintiff O'Brien who is not named.

C. Information Already in Possession

If process were issued to obtain information already in the hands of the agency, it would be an obvious breach of the good faith requirement imposed by *Powell*. Plaintiffs argue that the presently outstanding subpoenas cover the same material already contemplated in *SEC v. G.C. George*, 637 F.2d 685 (9th Cir. 1981), a case now pending before this court on remand. The government contends that the timeframe viewed in that action is distinct from that of the present case. Plaintiffs' bare conclusory assertion to the contrary pales before the specific dates referenced in the government's subpoenas. Barring a clear "same subject matter" overlap, the SEC is not precluded from investigating matters arising subsequent in time or out of different transactions, even though the nature of the violations suspected may be similar. *United States v. Morton Salt Co.*, 338 U.S. 662 (1950). I find that there is no subject matter overlap with respect to any of the plaintiffs.

D. Proper Administrative Steps

Plaintiffs argue that 17 C.F.R. section 202, as existing at the time the subpoenas were issued, required the SEC to find a "likelihood" of existing or potential violations prior to authorizing a formal investigation. The order is abundantly clear on its face in sections II and III that all of the plain-

tiffs, except O'Brien, were suspected of "likely" violations. As O'Brien was not named in the order, he reasonably questions whether the subpoenas issued to him were processed in good faith.

The government contends that section 202 merely reflects normal agency policy and practice, and does not rise to the level of a binding regulation. O'Brien's counterargument, however, finds support in recent persuasive case law. *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 127 (3d Cir. 1981) assumed without deciding that section 202 was binding upon the agency. Thus the agency's failure to "target" plaintiff O'Brien with a "likelihood" finding casts some doubt upon the validity of the subpoenas issued to him in that a critical administrative step was left unsatisfied.

IV. Equitable Relief—Pre-emptive Attack

The foregoing conclusions were drawn only to set the stage for this area of inquiry. Courts are certainly not *per se* precluded from enjoining agency process when clear abuse is shown. Such relief is rare, however, and is controlled by stringent testing factors. Synthesizing the holdings of those courts which have addressed the issue, the following factors have been considered germane:

1. The existence of a presently justiciable case or controversy;
2. The likelihood of imminent and irreparable harm; and;
3. Whether an adequate remedy at law exists.

Casey v. FTC, 578 F.2d 793 (9th Cir. 1978); *Howfield, Inc. v. United States*, 409 F.2d 694 (9th Cir. 1969).

A. Presently Existing Case or Controversy

With respect to plaintiff O'Brien personally, it developed during oral argument that no subpoenas are presently outstanding against him. That he voluntarily compiled with those subpoenas which were issued, and that counsel has admitted that there would have been compliance even if O'Brien had known he had been "targeted" leads me to believe that no justiciable issue exists with respect to O'Brien.

With respect to Magnuson, certain subpoenas are outstanding, but for reasons already stated, this process fully meets the four-part *Powell* test. If Maguson cannot satisfy the requirements of his remedy at law in terms of enforcement proceedings, certainly equitable relief is not available.

B. Likelihood of Harm

Plaintiffs assert irreparable harm in three distinct areas. Plaintiff O'Brien asserts that he is being harassed and unnecessarily burdened with process issued in bad faith. Had he wished to preserve this claim, it would have been a simple matter to resist the subpoenas. I trust that this court or any other would have given full consideration to claims of bad faith and/or improper administrative procedure had an enforcement action been brought.

Plaintiff Harrison alleges that the SEC, through Mr. Prince, engaged in an illegal search and seizure of his personal documents located in files situated in offices of the Spokane Stock Exchange. The question of standing to bring such a challenge, and of Harrison's legitimate expectation of privacy in those files, was not briefed nor argued to the court. *See generally Rakas v. Illinois*, 439 U.S. 128 (1978). In any event, it is difficult to see how the court could grant injunctive relief against a past constitutional violation.

Plaintiff Magnuson contends that the SEC leaked confidential information to the news media; or alternatively, that an indirect leak occurred when the SEC disclosed such information to a third party who in turn leaked to a reporter. The government denies the first contention, but admits the possiblity of the second. The argument is made that the SEC is required by law to convey arguably confidential information to those persons subject to investigation. That one receiving such data may have leaked information, contends the government, is entirely beyond its control.

Rather than consider the merits of this interesting argument, the issue can be disposed of with reference to the type and nature of harm claimed. Once again, plaintiffs are asking for injunctive relief against a prior wrong. There is no showing of imminent future harm, and no showing that

the SEC, even if guilty, intends a repeat performance. Further, plaintiff Magnuson's bare assertions of harm are less than adequate in the view of at least one court.

> [T]he mere suggestion by appellants of possible damage to their business activities is not sufficient to block an authorized inquiry into relevant matters.

SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

Even if every allegation in Magnuson's complaint were true, and for purposes of this action material factual assertions are taken as true, *Kennedy v. H & M Landing, Inc.*, 529 F.2d 987 (9th Cir. 1976), no court can grant injunctive relief for a past wrong. Magnuson's remedies lie, if at all, in an action at law.

Plaintiffs rely heavily upon *Silver King Mines v. Cohen*, 261 F. Supp. 666 (D. Utah 1966) as persuasive authority for the proposition that equitable relief prohibiting dissemination of defamatory material may be granted. In that case, the court did enjoin the SEC from continuing an aggressively adverse publicity campaign against Silver King. In so doing, the court found authority in the inherent equitable powers of the judiciary; but only after also finding that no other remedy existed. The court was further prompted by a finding that SEC actions were so arbitrary and capricious as to amount to a due process violation. The publicity spawned was wholly outside the legitimate functions of the agency, and was designed solely to harrass and pressure thus rising to the level of an ultra vires enforcement action. *Id.* at 674.

The egregious conduct in *Silver King* is not present in this case. Rather, the rule emanating from *Cell Associates, Inc. v. National Institutes of Health*, 579 F.2d 1155 (9th Cir. 1978) would appear more suited. In that decision, the court noted that Congress defined specific categories of violations which would support a cause of action under the Privacy Act. Several of these permit injunctive relief. An action based on unauthorized disclosure, however, does not. The aggreived person is left to his remedies at law as a result of clear legislative intent. *Id.* at 1159. *See also Hanley*

v. United States Department of Justice, 623 F.2d 1139 (6th Cir. 1980).

C. Remedies at Law

This memorandum and order is confined to questions relating to the extraordinary relief sought by plaintiffs. Thus, no consideration has been given to the merits or validity of any claims based on violations of civil rights legislation, the Privacy Act, or any other remedy at law for past harms allegedly suffered. Dismissal of the equitable portions of the complaints will not prejudice plaintiffs' future efforts at redress in these areas.

The sole concern at present is whether the subpoenas still outstanding, and the SEC's general investigation of the parties, is subject to pre-emptive attack at a matter of equity. Long-held case law suggests that plaintiffs' ability to resist enforcement of whatever subpoenas are now outstanding or may become so in the future, and to put the government to its proof, is sufficient protection against process issued in bad faith. *Reisman v. Caplin*, 375 U.S. 440 (1963); *Howfield, Inc. v. United States*, 409 F.2d 694 (9th Cir. 1969).

The government's Motion to Dismiss plaintiffs' claims for equitable relief is GRANTED, and dismissal shall be without prejudice to any claims at law that plaintiffs may wish to pursue.

IT IS SO ORDERED.

DONE BY THE COURT this 20th day of January, 1982.

/s/ Robert J. McNichols

ROBERT J. MCNICHOLS
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-3108, 82-3109, 82-3185

JERRY T. O'BRIEN, INC., DOING BUSINESS AS PENNALUNA & CO., ET AL., PLAINTIFFS-APPELLANTS.

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL., DEFENDANTS-APPELLEES,

and

HARRY F. MAGNUSON AND H.F. MAGNUSON & COMPANY, CROSS-PLAINTIFFS-APPELLANTS,

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL., CROSS-DEFENDANTS-APPELLEES.

[Filed Sept. 30, 1983]

ORDER

Before: SKOPIL, PREGERSON, and FERGUSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and an active judge called for an en banc vote. The matter failed to receive the vote of a majority of the active judges in favor of en banc consideration. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-3108, 82-3109, 82-3185

JERRY F. O'BRIEN, INC.

v.

SECURITIES AND EXCHANGE COMMISSION

[Filed Oct. 28, 1983]

KENNEDY, Circuit Judge, with whom SNEED, ANDERSON, POOLE, and NORRIS, Circuit Judges, join, dissenting from denial of rehearing en banc:

Our court, once again, gives a simple shrug when requested to invoke the short en banc procedure permitted us by Congress. 28 U.S.C. § 46(c)B(d). We decline to review a panel decision that is novel, of vast importance, and, in my view, most erroneous. Our refusal to review panel decisions of this type imposes an unnecessary burden on the Supreme Court. I dissent from the failure of the court to consider the case en banc.

The rule set forth by the panel opinion goes beyond any reasonable interpretation of the Supreme Court's opinions in *United States v. Powell*, 379 U.S. 48 (1965), and *United States v. Miller*, 425 U.S. 435 (1976); is an unwarranted extension of, if not in open conflict with, our own opinions in *Kelley v. United States*, 536 F.2d 897 (9th Cir. 1976), *cert. denied*, 429 U.S. 1047 (1977), and *Howfield, Inc. v. United States*, 409 F.2d 694 (9th Cir. 1969); and is an improper intrusion on the administrative function.

There is no principled basis for confining the panel holding to the context of an SEC investigation. It threatens to compromise government investigations by most agencies. Not only will wrongdoers be provided a new instrument of obstruction or delay, but also employees and others subject to reprisals will be chilled from cooperating with investigators. Under the panel decision, government agencies will

find it increasingly difficult to conduct confidential, nonpublic investigations in which actual targets are not discovered until a number of subpoenas have been served. Agencies may instead be forced to articulate premature conclusions about potential targets.

The panel decision should have been taken en banc.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-6035
DC# CV 83-3961 (CBM)

WEDBUSH, NOBLE, COOKE, INC., PLAINTIFFS-APPELLEES,

v.

SECURITIES AND EXCHANGE COMMISSION,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding
Submitted August 22, 1983

[Filed Aug. 30, 1983]

OPINION

BEFORE: HUG, TANG and NORRIS, Circuit Judges
NORRIS, Circuit Judge

FACTS

Appellant Securities and Exchange Commission (SEC) is conducting a formal, administrative investigation of Wedbush, Nobel, Cooke, Inc. (Wedbush), a registered securities brokerage firm with offices in Los Angeles and other western cities. The investigation concerns suspected violations of the anti-fraud and anti-manipulation provisions of the securities laws by Wedbush and its customers.

The SEC had issued subpoenas to numerous witnesses whose testimony was sought in connection with its investigation. No notice of these subpoenas was given directly to Wedbush, the target of the investigation. The SEC contends that some of the third-party witnesses had requested confidentiality and that disclosure of these witnesses to the target would impair the effectiveness of the investigation.

Wedbush brought an action in the district court seeking an injunction against continuation of the investigation without notification to them of the third-parties subpoenaed by the SEC. The district court, relying primarily on the decision of this court in *Jerry T. O'Brien, Inc. v. S.E.C.*, 704 F.2d 1065 (9th Cir. 1983), granted the injunctive relief requested. The court specifically found that the balance of hardships did not favor the SEC, that the public interest favored the injunction, and that the SEC did not have a strong likelihood of success on the merits, in view of the recent decision in *O'Brien, supra.*

The SEC filed a notice of appeal and now seeks an emergency stay of the district court's injunction pending its appeal.[1]

DISCUSSION

It is clear that this court's decision in *O'Brien* is directly on point as to the target's right to receive notification of SEC investigative subpoenas issued to third parties. *Jerry T. O'Brien, Inc. v. S.E.C.*, 704 F.2d at 1068-69. The SEC attempts to avoid its impact in this case by arguing that *O'Brien* is not authoritative because its petition for rehearing has stayed the mandate in that case pursuant to Fed. R. App. P. 41(a). We reject that argument.

The judgment of this court in *O'Brien* was entered on the court's docket on April 25, 1983 and the opinion was duly forwarded for publication. After receiving an extension of time the SEC filed a petition for rehearing and the mandate was stayed by the Clerk under Fed. R. App. P. 41(a).[2] It

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[1] The emergency motion for stay was denied by way of an order which indicated that a statement of reasons would follow. This opinion explains our prior action.

[2] It is not even clear that the filing of a motion for an extension of time to seek rehearing should have the effect of staying the mandate. *See United States v. Barela*, 571 F.2d 1108, 1110-15 (9th Cir. 1978) (Ferguson, J., dissenting); 16 Wright & Miller, *Federal Practice and Procedure* § 3987, p. 474 (1977). Nevertheless, it is the practice of the clerk of this court to withhold the mandate where a timely motion of this type is filed and granted. Such informal procedures illustrate the largely ministerial function of the mandate. *See* D. Knibb, *Federal Court of Appeals Manual* § 25.2, p. 274 (1981).

does not follow, however, that the judgment of the court in that case is without effect.

It is fundamental that the mere pendency of an appeal does not, in itself, disturb the finality of a judgment. *See Hovey v. McDonald*, 109 U.S. 150, 161 (1883); 9 J. Moore, *Federal Practice* ¶ 208.03 at 1407-08. Similarly, the pendency of a petition for rehearing does not, in itself, destroy the finality of an appellate court's judgment. *See Deering Milliken, Inc. v. F.T.C.*, 647 F.2d 1124, 1128-29 (D.C. Cir. 1978); *Amoco Oil Company v. Zarb*, 402 F. Supp. 1001, 1008 (D.D.C. 1975). Thus, even though the mandate has not yet issued in *O'Brien*, the judgment filed by the panel in that case on April 25, 1983 is nevertheless final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court.

Accordingly, we find that the district court in this case correctly relied on *O'Brien* to conclude that Wedbush had demonstrated a likelihood of success on the merits for purposes of granting preliminary relief. For the same reasons we conclude that the SEC has not demonstrated a strong likelihood of success on the merits of its appeal. Finally, we do not find that the balance of hardships tips strongly in favor of the SEC or that the public interest requires granting a stay in this case. The motion for a stay of the district court's injunction pending appeal is therefore denied. *See, e.g., Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 752-53 (9th Cir. 1982).

APPENDIX G

Section 19(a) of the Securities Act of 1933, 15 U.S.C. 77s(a), provides, in pertinent part:

> The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this subchapter.

Section 19(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), provides:

> For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

Section 22(b) of the Securities Act of 1933, 15 U.S.C. 77v(b), provides:

> In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a), provides, in pertinent part:

> The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title [or] the rules or regulations thereunder * * * *. The Commission is authorized in its discretion to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions.

Section 21(b) of the Securities and Exchange Act of 1934, 15 U.S.C. 78u(b), provides, in pertinent part:

> For the purpose of any * * * investigations * * * any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other other records which the Commission deems relevant or material to the inquiry.

Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(c), provides:

> In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 23(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78w(a)(1), provides, in pertinent part:

> The Commission *** shall *** have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title.

Section 18 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79r, provides, in pertinent part:

(a) The Commission, in its discretion, may investigate any facts, conditions, practices, or matters which it may deem necessary or appropriate to determine whether any person has violated or is about to violate any provision of this chapter or any rule or regulation thereunder, or to aid in the enforcement of the provisions of this chapter, in the prescribing of rules and regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(b) The Commission upon its own motion or at the request of a State commission may investigate, or obtain any information regarding the business, financial condition, or practices of any registered holding company or subsidiary company thereof or facts, conditions, practices, or matters affecting the relations between any such company and any other company or companies in the same holding-company system.

(c) For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(d) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an

order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who, without just cause, shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

Section 20(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79t(a), provides, in pertinent part:

> The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this chapter, including rules and regulations defining accounting, technical, and trade terms used in this chapter.

Section 319(a) of the Trust Indenture Act of 1939, 15 U.S.C. 77sss(a), provides, in pertinent part:

> The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate in the public interest or for the protection of investors to carry out the provisions of this subchapter, including rules and regulations defining accounting, technical, and trade terms used in this subchapter.

Section 321(a) of the Trust Indenture Act of 1939, 15 U.S.C. 77uuu(a), provides:

> For the purpose of any investigation or any other proceeding which, in the opinion of the Commission, is necessary and proper for the enforcement of this subchapter, any member of the Commission, or any officer

thereof designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such books, papers, correspondence, memoranda, contracts, agreements, or other records may be required from any place in the United States or in any Territory at any designated place of investigation or hearing. In addition, the Commission shall have the powers with respect to investigations and hearings, and with respect to the enforcement of, and offenses and violations under, this subchapter and rules and regulations and orders prescribed under the authority thereof, provided in sections 77t and 77v(b), (c) of this title.

Section 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-37(a), provides, in pertinent part:

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission elsewhere in this subchapter, including rules and regulations defining accounting, technical, and trade terms used in this subchapter, and prescribing the form or forms in which information required in registration statements, applications, and reports to the Commission shall be set forth.

Section 41(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-40(a), provides, in pertinent part:

The Commission may make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subchapter or of any rule, regulation, or order hereunder, or to determine whether any action in any court or any proceeding before the Commission shall be instituted under this subchapter against a particular person or persons, or with respect to a particular transaction or transactions.

Section 41(b) of the Investment Company Act of 1940, 15 U.S.C. 80a-40(b), provides:

> For the purpose of any investigation or any other proceeding under this subchapter, any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

Section 41(c) of the Investment Company Act of 1940, 15 U.S.C. 80a-40(c), provides:

> In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

Section 209(a) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-9(a) provides:

> Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person, it may in its discretion require, and in any event shall permit, such person to file with it a statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation, and may otherwise investigate all such facts and circumstances.

Section 209(b) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-9(b), provides:

> For the purposes of any investigation or any proceeding under this subchapter, any member of the Commission or any officer thereof designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

Section 209(c) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-9(c), provides:

> In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in

question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

Section 211(a) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-11(a), provides:

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this subchapter. For the purposes of its rules or regulations the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.